In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Chapter 13 Case
DAVID EMIL ARNAL	)	
	)	Number 03-40429
Debtor	)	

ORDER ON DEBTOR'S MOTION TO IMPOSE STAY PENDING APPEAL

On February 6, 2003, David Emil Arnal ("Debtor") filed his Petition for Relief under Chapter 13 of the Bankruptcy Code. On February 21, 2003, Laura Lawton Fraser ("Fraser"), Debtor's ex-wife, filed a Motion to Modify Stay in order to proceed in the Family Court for the Fourteenth Judicial Circuit, Beaufort, South Carolina ("Family Court") to enforce her rights as set forth in an Amended Final Order. This Court granted Fraser's motion in an order filed June 10, 2003. In response, Debtor filed a Notice of Appeal, Motion for Stay Pending Appeal and Motion for Emergency Hearing on June 16, 2003. Accordingly, this Court held an emergency hearing on Debtor's Motion for Stay Pending Appeal on June 26, 2003.

A. Standard for Granting a Stay Pending Appeal

This Court has the discretion to grant a stay pending appeal pursuant to Federal Rule of Bankruptcy Procedure 8005. In determining whether a discretionary stay

should be granted, courts have adopted a four factor test that examines the following: 1) the likelihood the movant will prevail on the merits on appeal; 2) whether, absent a stay, the movant will suffer irreparable damage; 3) whether the adverse party will suffer no substantial harm from the issuance of the stay; and 4) whether the public interest will be served, rather than disserved,[1] by issuing the stay. *See, e.g.* Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986).

Ordinarily, the first factor, likelihood of an appeal's success, is the most important factor when determining whether to grant a stay pending appeal. *Id.* However, a movant does not always have to demonstrate a probable likelihood of success on the merits on appeal. Where the balance of the equities (factors 2 through 4) weigh heavily in favor of granting the stay, the movant need only show a "substantial case on the merits." *Id.; cf.* Gonzalez v. Reno, 2000 WL 381901, *1 (11th Cir. 2000) (citing Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981)) (granting motion for injunction[2] pending appeal while enjoining six-year old child from leaving the United States); Brumlik v. United States (In re Brumlik), 132 B.R. 495, 497 (M.D. Ga. 1991) (holding that debtors not entitled to stay pending appeal where

[1]When applying the factors used in determining if a stay pending appeal is appropriate, some cases support the notion that it must be determined whether the public interest will be *served*. *See* Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11th Cir. 1986); Jean v. Nelson, 683 F.2d 1311, 1312 (11th Cir.1982)1981). Other cases examine whether or not granting a stay will *disserve* or *offend* the public interest. *See* Gonzalez v. Reno, 2000 WL 381901, *1 (11th Cir. 2000); Piedmont Heights Civil Club, Inc. v. Moreland, 637 F.2d 430, 435 (5th Cir. 1981). Here, we must balance the interests of the federal bankruptcy system against those of the State of South Carolina.

[2]It has been noted that the factors used in granting a stay pending appeal mirror those used when ruling on an application for preliminary injunction. *See*, *e.g.* Matter of Forty-Eight Insulations, Inc., 115 F.3d 1294, 1300 (7th Cir. 1997); In re Bankruptcy Appeal of Allegheny Health, Educ. and Research Foundation, 252 B.R. 309, 321 (Bankr. W.D. Pa. 1999).

debtors showed practically no chance of proving that change of venue was inappropriate).

B. There Still Exists a "Substantial Case on the Merits"

Debtor has stated that, on appeal, he intends to argue that the decision of the Eleventh Circuit Court of Appeals in Carver v. Carver, 954 F.2d 1573 (11th Cir. 1992), does not apply to a circumstance in which a debtor admits the amount of his prepetition indebtedness and offers to pay that amount through periodic payments to the Chapter 13 trustee. In so arguing, he will be asking the appellate court to limit, not overrule, Carver.

In Carver, the principle was enunciated that bankruptcy courts should liberally grant relief from the automatic stay imposed by the filing of a bankruptcy petition in situations involving alimony, maintenance, or support in order to avoid entangling federal courts in family law matters best left to state courts. *Id.* at 1578. In my previous order, I acknowledged that the Eleventh Circuit recently restated its belief that the Carver decision remains good law. *See* Cummings v. Cummings, 244 F.3d 1263, 1267 (11th Cir. 2001) (holding that state courts have concurrent jurisdiction with bankruptcy courts to determine whether an obligation is in the nature of support for the purposes of §523(a)(5)). Nevertheless, Debtor's counsel has argued two factual distinctions which might very well lead the District Court or the Eleventh Circuit to conclude that granting Fraser's motion to pursue her claims against Debtor in state court was not an appropriate response and that Carver should not be controlling on these facts.

In Carver, there was no remaining issue as to how much money the debtor owed the ex-spouse under the terms of the domestic relations order. To the contrary in this case, Debtor is still prosecuting an appeal from the Amended Final Order filed October 17, 2001, in the Family Court. He has contended vociferously in this Court that the Amended Final Order should be set aside and remanded, *inter alia*, because the trial judge imputed to him far more income than he has ever earned thus establishing an onerous level of child support. Clearly, he has defaulted on numerous occasions and has been repeatedly cited for contempt (a factor that weighed strongly in this Court's earlier decision). Without evaluating the substance of Debtor's arguments, it is true that his liability to his former spouse might be reconstituted and reduced as a result of the appellate proceedings. Therefore, there is a stronger argument here, than in Carver, for allowing him the breathing spell afforded to debtors in bankruptcy while he awaits the outcome of his appeal in the Family Court matter.

Further, the debtor in Carver concealed from the ex-spouse the fact that he had filed bankruptcy by not scheduling her claim in his petition and schedules. Only when faced with the possibility of incarceration in the state court proceedings did the debtor, at the eleventh hour, reveal the bankruptcy and plead the benefit of the automatic stay. While recognizing that debtor's ex-wife violated the automatic stay by proceeding with her contempt action, the Eleventh Circuit found that fining the ex-wife for such a violation was inappropriate. Unlike the debtor in Carver, there is no evidence in this case that Debtor has acted in bad faith as he did not conceal the existence of his obligations to Fraser when he

filed his petition and schedules. Indeed, the primary, if not sole, reason for his filing bankruptcy was to gain the benefit of the automatic stay. Regardless, he has not committed the sort of crafty, underhanded behavior in this forum which the debtor in Carver had.

Based on the foregoing two factual distinctions, Debtor has established that the appeal of my order presents a "substantial case on the merits." In so declaring, I in no way distance myself from my June 10, 2003, Order. I still feel that the substantial weight of authority in this district and circuit indicates that this Court was correct in granting Fraser's Motion to Modify Stay. The original case, however, did not involve a factual question such that the decision would be set aside only if found to be "clearly erroneous." *See* Fed. R. Bankr. P. 8013. Instead, it involved interpreting the extent of the Eleventh Circuit's 1992 holding in Carver and such legal determinations are reviewed *de novo* by appellate courts. *See* Reider v. Federal Deposit Insurance Corp. (In re Reider), 31 F.3d 1102, 1104 (11th Cir. 1994).

While the Eleventh Circuit in Cummings recently renewed its holding in Carver, it did so in a case bearing no factual resemblance to the one on which I ruled. It has been previously noted that at least one court outside this circuit has embraced the idea that granting relief from stay, even in family law matters, should be the exception rather than the rule. *See* Mudd v. Jacobson (In re Jacobson), 231 B.R. 763, 765 (Bankr. D. Ariz. 1999) (holding that immediate termination of stay was not appropriate to allow ex-wife to enforce

prepetition child support arrearages in state court) . Further, when a question of law has not been definitively addressed by a higher court, as is the case here, it is clear that the party seeking stay can more easily establish that there is a "substantial case on the merits." *See* Cullwell v. Texas Equipment Co., Inc. (In re Texas Equipment Co., Inc.), 283 B.R. 222, 227 (Bankr. N.D. Tex. 2002) (finding stay pending appeal proper in case involving application of state law where there was no case directly on point).

C. The Balance of the Equities Weigh Heavily In Favor of Granting a Stay

Since it has been determined that there still exists a "substantial case on the merits," Debtor can prevail if he can show that the "balance of the equities" in granting a stay weigh heavily in his favor.

1. Irreparable Damage to Movant

Debtor will suffer "irreparable damage" if the Family Court is allowed to enforce the Amended Final Order. He has presented unrefuted affidavits from Sally Calhoun, his attorney in the Family Court proceeding, and his current father-in-law, Alvin Hitt, in support of his contention that if the Family Court is allowed to enforce its order he will likely be incarcerated. *See* Debtor's Ex. A, ¶9-11; Debtor's Ex. B, ¶5. If he is incarcerated by the Family Court, Debtor will certainly be at risk of losing his job. At the very least, he will be prevented from earning the monies required to fund his bankruptcy plan and will likely become delinquent in the payment of post-petition child support.

2. Substantial Harm to Opposing Party

In contrast to Debtor, Fraser need suffer no "substantial harm" if I stay my prior order. While Fraser has unquestionably suffered in the past as a result of Debtor's defaults, this Court can fashion an order to ensure that there will be no further harm occasioned by the imposition of a stay in this case. In particular, I hold that her harm will be obviated if Debtor's stay pending appeal is conditioned as follows:

1) Debtor will remain current on all post-petition child support and medical expense reimbursement obligations upon penalty of dismissal of his case;
2) Debtor will make all payments to the Chapter 13 Trustee in a timely fashion upon penalty of dismissal of his case;
3) Debtor's plan payments will be raised, until further order of the Court, to $1,700.00 per month beginning August 20, 2003, in order to fund the claims that have been filed or are hereinafter to be filed. In particular, I estimate that Fraser's claim for pre-petition arrearages total $92,000.00, which is comprised of $13,970.00 in past due child support plus attorney's fees awarded or accrued in the domestic relations action as well as amounts payable to Fraser's Chapter 13 counsel, James L. Drake, Jr.
4) Debtor post a supersedeas bond in the amount of $51,000.00 as demanded by Fraser's counsel.

So long as Debtor maintains the payments to the Trustee, to his ex-spouse, and provides the appropriate bond, imposition of a stay pending appeal will not cause any further harm to Fraser.

3.Public Interest

It determining whether or not a stay pending appeal serves or disserves the public interest, this Court must weigh the interests of the federal bankruptcy system against those of the South Carolina Family Court. The Supreme Court has addressed the remedial purposes of the bankruptcy laws on various occasions. For example, in Stellwagen v. Clum the Court stated:

> The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great stress upon this feature of the law--as one *not only of private but of great public interest* in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life.
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> 245 U.S. 605, 617, 38 S.Ct. 215, 218-219, 62 L.Ed. 507 (1918) (emphasis added) *noted in* Burnes v. Pemco Aeroplex, Inc, 291 F.3d 1282, 1289 (11th Cir. 2002).

If the Family Court is allowed to enforce the Amended Final Order, Debtor will likely be

incarcerated and unable to fund his bankruptcy plan. If this happens, the public interests of the federal bankruptcy system will not be realized in that Debtor's opportunity to have a "fresh start in life" will be put in serious jeopardy.

The State of South Carolina clearly has a public interest in enforcing and reviewing its own child support orders and the Eleventh Circuit Court of Appeals in Carver articulated a clear line of demarcation between state and federal jurisdiction. Here, South Carolina's interest appears stronger than the federal interest. However, this Court can fashion an interim order that will protect the federal interests pending appeals while not contravening the interests of South Carolina or the mandate of Carver as currently understood.

Bankruptcy courts are allowed to act in domestic relations matters when they are not required to "delve too deeply into family law." Carver, 954 F.2d at 1580. I have estimated the claims owed by Debtor to Fraser for the purposes of confirming a plan under Chapter 13 as I am permitted to do by 28 U.S.C. §157(b)(2)(B). In making such estimation, I have treated the claims of Fraser as detailed in the Amended Final Order issued by the South Carolina Family Court and currently on appeal as if they were final. I believe that making such estimation while all matters are on appeal represents a "hands-off" approach that strikes the appropriate balance between state and federal jurisdiction. First, such an approach allows Debtor to work without the threat of incarceration while all legal issues are

resolved and to begin to repay his debts to Fraser and the other bankruptcy creditors.[3] Second, making such estimation does not abrogate the authority of South Carolina courts to adjudicate the ultimate amount of the claims[4]. Finally, accepting the figures of the Family Court as final does not require this court to "delve too deeply into family law."

Because Debtor will suffer irreparable damage if my prior order is not stayed pending appeal, Fraser will suffer no new or additional "substantial harm" while awaiting such appeal, and the public interest will not be offended by my imposing a stay pending appeal, the "balance of the equities" weigh heavily in Debtor's favor. Further, since a serious legal question has been raised and an appellate court could find that Carver does not apply to the facts of this case, there still exists a "substantial case on the merits."

O R D E R

IT IS THEREFORE ORDERED that stay pending appeal is issued for so long as: (1) Debtor maintains a supersedeas bond in the amount of $51,000.00; (2) Debtor makes direct payments to his ex-spouse of all sums arising post-petition that have been ordered by the South Carolina courts for child support, medical expenses, and attorney's fees; and (3) Debtor maintains all payments to the Chapter 13 Trustee in the amount of

[3]When Debtor filed his petition for bankruptcy, he owed $22,850.27 in secured claims, $3,860.98 in unsecured priority claims excluding amounts related to child support and $80,358.18 in unsecured claims.

[4]It should be noted that if Debtor is successful in reducing the amounts currently owed pursuant to the Amended Final Order that he will, of course, be entitled to an adjustment in the amount which he must fund in this bankruptcy.

$1,700.00 per month or such other amount as the Court may hereinafter require. Further, the stay shall be lifted to allow Debtor to prosecute his motion for modification of the South Carolina decree and Fraser to join the issue and assert any defenses or counterclaims that she may have so that the matter may be timely prosecuted to its conclusion.

Finally, upon Debtor defaulting on any of the above obligations and Fraser's filing of an affidavit of non-compliance with this Court with respect to any payment to the Trustee or payment of a post-petition court ordered obligation, this Court will, unless the factual accuracy of said affidavit is controverted within ten (10) days, issue an order lifting this stay pending appeal and permit Fraser to proceed as contemplated in my Order filed June 10, 2003.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of July, 2003.